

BARAFF, KOERNER, OLENDER & HOCHBERG, P. C.

ATTORNEYS AT LAW
5335 WISCONSIN AVENUE, N. W., SUITE 300
WASHINGTON, D. C. 20015-2003

(202) 686-3200

B. JAY BARAFF
ROBERT L. OLENDER
JAMES A. KOERNER
PHILIP R. HOCHBERG
MARK J. PALCHICK
JAMES E. MEYERS
SUSAN R. ATHARI
THOMAS B. MAGEE
*ADMITTED IN VA ONLY

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OF COUNSEL
ROBERT BENNETT LUBIC

FAX: (202) 686-8282

November 2, 1994

VIA HAND DELIVERY

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Opposition to Petition for Reconsideration
Filed by Puerto Rico Telephone Company
Pegasus Communications, Inc.

GEN Docket No. 90-314, FCC 94-218

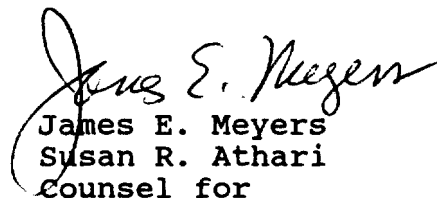
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Dear Mr. Caton:

Enclosed, on behalf of Pegasus Communications, Inc., please find an original and five (5) copies of its "Opposition to Petition for Reconsideration Filed by Puerto Rico Telephone Company" as referenced above.

Should you have any questions, please contact the undersigned.

Sincerely,


James E. Meyers
Susan R. Athari
Counsel for

Pegasus Communications, Inc.

JEM:pk
Enclosures

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OPPOSITION TO PETITION FOR RECONSIDERATION
FILED BY PUERTO RICO TELEPHONE COMPANY

^{1/} Second Memorandum Opinion and Order, GEN Dkt. No. 9-314, FCC 94-218, 9 FCC Rcd. 4519 (released August 25, 1994) hereinafter Second MO&O).

2/ On July 25, 1994 PRTC filed a petition for reconsideration of the Commission's broadband PCS Memorandum Opinion and Order which the Commission denied. See Third Memorandum Opinion and Order, GEN Docket No. 90-314, FCC 94-265 (released October 19, 1994) at para. 55.

**I. The Commission Has Authority, On Its Own Motion,
To Amend The Puerto Rico BTA Service Areas For
Narrowband PCS.**

In the Second Memorandum Opinion and Order, the Commission adopted Pegasus' suggestion that the Commission, sua sponte, provide two separate BTA-like service areas for Puerto Rico for narrowband PCS service. Second MO&O, para. 18-19. PRTC in essence contends that the Commission is without authority to so amend the regulations adopted in the First Report and Order because no petition for reconsideration on the BTA-like structure of Puerto Rico had been filed within the 30 day period commencing from public notice of the First Report and Order. PRTC Petition, 5-6.^{3/} As support for the notion that the Commission somehow does not have authority in the same proceeding to modify rules adopted therein, PRTC cites inapposite Section 1.108 and Section 1.412 of the Commission's rules. Section 1.108, concerning adjudications and not rulemakings, states in part

^{3/} According to PRTC, September 10, 1993, was the deadline for petitions to reconsider the First Report and Order. PRTC Petition at 6. PRTC likewise contends that the Commission in essence acted on Pegasus' petition for reconsideration, GEN Docket 90-314 (filed December 8, 1993) of the Second Report and Order, in establishing two BTA-like service areas for narrowband PCS and thus has done so without authority. Id. PRTC's contention is without merit. In the Second MO&O, the Commission clearly articulated that it granted Pegasus' "request" for two BTA-like broadband PCS service areas with respect to the Second Report and Order, and that, in response to Pegasus' "suggestion" the Commission, sua sponte, did the same with respect to the narrowband. Second MO&O, para. 17.

that, "[t]he Commission may, on its own motion, set aside any action made or taken by it within 30 days from the date of the public notice of such action" See 47 C.F.R. § 1.108 (emphasis added). By reconciling PCS service areas in General Docket No. 90-314, the Commission has not set aside actions previously taken which, in an adjudicatory context, may affect the vested rights of particular parties. Rather, the Commission, in the course of rulemaking, has modified its proposed BTA service areas for Puerto Rico for both narrowband and broadband PCS. PRTC itself identifies the Commission's action in the instant case as a "modification".^{4/} Section 1.108 clearly does not apply.

Section 1.412, which governs rulemaking notices under the Administrative Procedure Act, 5 U.S.C. § 553 et seq. ("APA"), is not implicated. First, the Commission gave adequate notice in the initial notice of proposed rulemaking for PCS that it was considering several options, including the BTA framework, for PCS service areas. Notice of Proposed Rulemaking and Tentative Decision, GEN Docket No. 90-314, 7 FCC Rcd. 5676, 5700 (1992). Pegasus submits that the above notice in and of itself is sufficient to satisfy

^{4/} See PRTC Petition at 3. Section 1.429(i) states in part that, "Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order." 47 C.F.R. § 1.429(i). Indeed, PRTC points to Section 1.429(i) as authority for filing its instant Petition.

APA requirements. See, e.g., Amateur Radio Service (Repeater Coordination), 62 RR 2d 109 (1987); Cable System Carriage of TV Signals, 43 RR 2d 1553 (1978). See also, Tom C. Clark, Attorney General's Manual On The Administrative Procedure Act (Department of Justice, 1947) at 29.^{5/}

The Commission clearly has discretion, on its own motion, to modify rules adopted by an order in an earlier phase of the same open proceeding, even under PRTC's adjudicatory approach. It is undisputed that a timely-filed petition for reconsideration serves to toll the 30-day period for reconsideration.^{6/} As such, the Commission is not confined to the 30-day time limitations PRTC claims applicable under Section 1.108 to act sua sponte.

Numerous parties have filed petitions for reconsideration at various stages of the PCS proceeding,

^{5/} The Attorney General's Manual, which is long-recognized APA jurisprudence, recognizes that the APA requirement that the notice contain "[e]ither the terms or substance of the proposed rule or a description of the subjects and issues involved" is satisfied with less than proposed regulations:

Where able to do so an agency may state the proposed rule itself or the substance of the rule in the notice required by section 4(a). On the other hand, the agency, if it desires, may issue a more general "description of the subjects and issues involved".

Clark, supra., at 29.

^{6/} Application of Radio Americana, Inc., 21 RR 70a (1961); Central Florida Enterprises, Inc. v. FCC, 44 RR 2d 345 (1978).

thereby tolling the 30-day period for reconsideration within which the Commission clearly may act on its own motion.^{7/}

As PRTC acknowledges, the Commission must consider, which it did, all relevant comments and materials of record before taking rulemaking action, per Section 1.425.^{8/} The Commission clearly had record support for its decision.^{9/}

Section 1.429(i) is the precise vehicle to address PRTC's point: Reconsideration is appropriate where rules adopted in an original order are modified by subsequent

^{7/} Tolling petitions for reconsideration of the First Report and Order were considered in the Memorandum Opinion and Order. A tolling petition for reconsideration of the Memorandum Opinion and Order was considered in the Second MO&O along with the Commission's sua sponte decision with respect to Puerto Rico narrowband PCS service areas. See Second MO&O at para. 1 and n.1. The Commission clearly had authority to entertain the action it took with respect to Puerto Rico.

^{8/} 47 C.F.R. § 1.425. The Commission considered in the PCS record Pegasus' petition for reconsideration of the Second Report and Order and exhibits thereto and Pegasus' ex parte submission in the PCS docket. Second MO & O at para. 17 and n.18. The Commission likewise considered PRTC's petition for reconsideration of the Memorandum Opinion and Order as part of the PCS record before it, which PRTC acknowledged as appropriate. Id. n.22; PRTC Petition at 7, and n.8. The issue of Puerto Rico PCS service areas for narrowband PCS was clearly joined in the record: Pegasus' submissions in support of two BTA-like service areas and PRTC's submission in support of one BTA-like service area in opposition to Pegasus. The weight of the record before the Commission was more than adequate to justify the Commission's findings in the Second MO&O.

^{9/} Indeed, the Commission may consider all relevant pleadings, even a pleading filed in conjunction with another proceeding, to ensure the administrative finality of its determinations. See FM Channel Assignments, 58 RR 2d 147 (1985).

order. By its instant petition, PRTC has availed itself of the Commission's procedures and now has the forum to once again voice its position.

II. Reconsideration of Two BTA-like Narrowband PCS Service Areas For Puerto Rico Is Not Appropriate.

The Commission correctly determined from the record that two BTA-like service areas for narrowband PCS is appropriate for Puerto Rico. By its action, the Commission made Puerto Rico PCS service areas for broadband and narrowband PCS coextensive, consistent with the Commission's nationwide licensing regime.

In addition to Pegasus' submissions in the record (Second MO&O at para. 17 n.18), Pegasus provided the Commission additional support for two BTA-like service areas for Puerto Rico. See Pegasus' Opposition to Petition for Reconsideration, GEN Dkt. 90-314 (filed August 30, 1994); Request for Leave To Respond and Response To Reply of Puerto Rico Telephone Company, GEN Dkt. No. 90-314 (filed September 30, 1994). (See also PRTC's Reply to Opposition to Petition for Reconsideration, GEN Dkt. 90-314 (filed September 14, 1994) wherein PRTC sought to further support its position.)

In denying PRTC's petition for reconsideration of the Memorandum Opinion and Order, the Commission considered Pegasus' and PRTC's submissions upon which it made additional findings with respect to the appropriateness of

two BTA-like PCS service areas in Puerto Rico. See Third Memorandum Opinion and Order, GEN Dkt. 90-314, FCC 94-265 (released October 19, 1994) at paras. 52-55. There, the Commission recognized that two BTAs are the best method, offer more choices and allow the marketplace to decide which is the better choice.

In reaching its decision, the Commission stated that it was not persuaded by PRTC's arguments to reinstate a unitary local service area for Puerto Rico. The Commission found that a single BTA could potentially preclude many individuals and companies from competing against PRTC while two BTA-like PCS service areas do not greatly affect PRTC and that PRTC can purchase two BTA licenses if it desires to serve all of Puerto Rico. Id. at para. 55 and n.101.

PRTC's Petition, here, says nothing new. PRTC has merely shifted the focus of its arguments to whatever facilities configurations it seeks to protect. Whereas in its broadband petition PRTC attempted to identify the public interest with the extent of its cellular facilities configurations^{10/}, which the Commission implicitly rejected^{11/}, PRTC now seeks a unitary BTA to protect its

^{10/} See PRTC Petition for Reconsideration, GEN Dkt. 90-314 (filed July 25, 1994) at 9.

^{11/} Third Memorandum Opinion and Order at para. 55 n. 100.

island-wide paging facilities. PRTC petition at 12, 14.^{12/} PRTC's public interest mantle is no less self-serving here.

The Commission's articulated basis for confirming two BTA-like broadband PCS service areas is applicable for denying PRTC's Petition here. Moreover, the Commission's narrowband PCS construction requirements dramatically portray the public interest benefits derived from the two BTAs. BTA narrowband PCS licensees are required merely to build at least one base station and begin providing service in the BTA within one year of initial license grant.^{13/} If there were only one BTA for Puerto Rico, a BTA licensee could easily satisfy its construction requirements by building a base station in San Juan without extending service to the rest of the island. On the other hand, two BTAs ensures that PCS will be simultaneously extended to different portions of the island and will foster competition.

The two BTAs established by the Commission clearly further the overarching purpose of the Communications Act to ensure as far as possible the rapid availability of communications services and adequate facilities for all.^{14/}

^{12/} We note that none of the other paging licensees identified by PRTC nor any other person sought reconsideration of the Commission's decision with respect to the Puerto Rico BTA-like service areas. See PRTC petition at 14 n. 22.

^{13/} 47 C.F.R. § 99.103.

^{14/} 47 U.S.C. § 151.

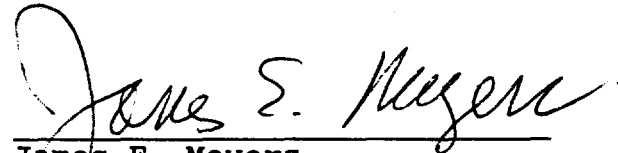
III. Conclusion

Accordingly, the Commission should deny the Petition
for Reconsideration filed by Puerto Rico Telephone Company.

Respectfully submitted,

PEGASUS COMMUNICATIONS, INC.

By:


James E. Meyers
Susan R. Athari
Its Counsel

BARAFF, KOERNER, OLENDER & HOCHBERG, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015
(202) 686-3200

CERTIFICATE OF SERVICE

I, Pamela J. Kidwell, a secretary in the law offices of Baraff, Koerner, Olender & Hochberg, P.C., do hereby certify that copies of the foregoing "OPPOSITION TO PETITION FOR RECONSIDERATION FILED BY PUERTO RICO TELEPHONE COMPANY" were served this 2nd day of November, 1994, via first class mail, postage prepaid upon the following:

David A. Irwin
Jeffrey L. Timmons
Irwin, Campbell & Crowe, P.C.
1320 18th Street, N.W.
Suite 400
Washington, D.C. 20036



Pamela J. Kidwell